Neutral Citation Number: [2022] EWHC 1435 (Fam)

Case No: FD22P00346

IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13th June 2022

Before :

MRS JUSTICE ARBUTHNOT

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Between :

BARTS HEALTH NHS TRUST	**Applicant**
- and –	
HOLLIE DANCE	**1st Respondent**
- and –	
PAUL BATTERSBEE	**2nd Respondent**
- and –	
ARCHIE BATTERSBEE (through his 16.4 Guardian)	**3rd Respondent**

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Fiona Paterson (instructed by **Kennedy's Law**) for the **Applicant**
Bruno Quintavalle (instructed by Moore Barlow LLP) for the **1st Respondent and 2nd Respondent**
Katie Gollop QC (instructed by **Cafcass Legal**) for the **3rd Respondent**

Hearing dates: 6th – 8th June 2022
Draft judgment: 10th June 2022

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JUDGMENT

Mrs Justice Arbuthnot:

Introduction

Applications

1. I am concerned with Archie Battersbee, a boy aged 12, who was born on 10th March 2010. He is the much loved and loving son of the First and Second Respondents, Hollie Dance and Paul Battersbee. For convenience I have referred to the Respondent parents as "Archie's mother", "Archie's father" or as "Archie's parents".

2. Barts Health NHS Trust is making two applications in relation to Archie. The first is for the Court to make a declaration that Archie is brain stem dead and that he was dead on a particular date and second, if the Court is not able to make that finding, then the Court should consider whether it is lawful and in Archie's best interests to continue to receive mechanical ventilation.

3. The applications are opposed by Archie's parents. Archie's mother has been sitting at his bedside for the past eight weeks. His father has been visiting frequently. They rightly say they know their son best. They rely on recent video evidence that they say shows Archie gripping the hand of his mother and tears coming from his eyes. The family argue that Archie needs to be given more of a chance for his brain to recover. They would like to take him home although more recently it appeared that they accept that he will not be able to go home but that they would like him to die naturally in the hospital as that accords with their Christian faith.

4. The Trust's application is supported by Archie's Guardian.

5. As will be apparent immediately these are extraordinarily difficult proceedings involving a young boy who is very severely brain damaged. Proceedings of these kinds although rare, are a particular strain on everybody involved and I was very grateful to counsel for the parties for their kind and sensitive approach to the issues raised by this unusual case. Mr Quintavalle and those instructing him were acting pro bono for some if not all of this time and my thanks to him for his considerable work on behalf of Archie's family.

Archie

6. At the parents' invitation I met Archie at the Royal London Hospital on Friday 27th May 2022. Ms Stanley the solicitor for the child was present and made a note of the visit.

7. A lovely looking young boy, Archie seemed very peaceful despite the fact that he was connected to a number of tubes and medical equipment. His mother, and Ms Carter, his brother's partner and the family spokesperson, were also present. They were holding his hand. From what I know, the mother has hardly left his side in the eight weeks since his accident. I saw the bedside chair which converts into a single bed which she has been sleeping on.

8. The mother introduced me to the many teddies surrounding Archie: memorably a rather bald teddy is called Barry that he named after a friend with a receding hairline. There were also many new ones given to the family by well-wishers.

9. The devotion of the family is extraordinary, their dignity obvious, I have no doubt at all that their worst fear is that the clinicians are right, and that their much-loved son has lost his present and his future and that this period in which their lives have been in suspension is coming to an end.

10. The visit has allowed me to hold Archie in my mind's eye as I have considered the applications made by the Trust. He has become much more real to me than when I had merely a photograph showing him with his well-earned medal for gymnastics.

Background

11. On 7th April 2022 the mother found Archie suspended by his neck from the banisters in the family home. He had been away from her sight for about ten minutes. It would seem he had had a tragic accident when messing around with a dressing gown cord.

12. The mother managed to get him down and administered CPR. She called the ambulance service at about 4.12pm which arrived at 4.20pm and paramedics continued the CPR on their way to the hospital. When they arrived he had had a cardiac arrest and had no pulse and spontaneous circulation was only achieved at 4.48pm. During this period of cardiac arrest, it seems Archie's brain was starved of oxygen and blood supply for a number of minutes.

13. Archie was taken to Southend Hospital and underwent investigations. Later that night or in the early hours of the following day he was transferred to Royal London Hospital where he has remained ever since. He has never regained consciousness and remains in a coma.

14. In the past eight weeks Archie has undergone a number of tests. His case has been considered by the treating clinicians at the Royal London Hospital and at various points the hospital has obtained second opinions from other specialists, some of them based at different hospitals.

15. The tests that Archie has undergone have a particular importance in the light of the unique situation the hospital found itself in when it became impossible to administer to Archie the approved brain stem test for neurological death.

The Court process leading up to 6th June 2022

16. Proceedings were started on 26th April 2022 when the Trust made two applications, the first for a Specific Issue Order under section 8 of the Children Act 1989 that it was lawful for Archie to undergo brain stem testing in accordance with the Academy of Medical Royal Colleges' 2008 Code of Practice for the Diagnosis and Confirmation of Death ("the Code of Practice") to establish whether or not he was brain stem dead. The parents had refused to give their consent to the test.

17. The second application was for a declaration that it was lawful to withdraw mechanical ventilation from Archie, which would result in his heart stopping beating.

18. Archie's case came before the High Court on two occasions for directions, it came before Roberts J on 28th April 2022 when the family was not represented but Archie was joined as a party and a Guardian was appointed. A Reporting Restrictions Order ("RRO) prohibiting the identification of any of the parties was made. It came before Morgan J on 4th May 2022 when the family was

represented by Mr Quintavalle. The matter was directed to be listed for the brain stem test question to be considered by the Court.

19. The hearings in this matter have been conducted in private with the attendance of accredited members of the press. On 4th May 2022, a Reporting Restrictions Order ("RRO") was made preventing the publishing or broadcasting of any information which identified or was likely to identify any person, doctor or healthcare professional or other who has cared for or treated Archie and any who have provided a second opinion. The order originally also applied to the CAFCASS Guardian. However, after it was made, the Guardian did not pursue anonymisation for herself and she was named in my judgment published on 13 May 2022. The RRO remains in force and I have anonymised the doctors and other healthcare professionals whose evidence I have summarised below. For the avoidance of doubt, assuming compliance with the RRO and subject to any future alteration to it, the provisions of s12(1) of the Administration of Justice Act 1960 have not and shall not apply to reporting of the hearings concerning Archie.

20. Archie's case came before me on 12th and 13th May 2022 by which time very sensibly the Trust had decided to proceed with one application only which was for an order that a brain stem test should take place.

21. On 9th May 2022 Dr Playfor an independent specialist intensivist examined Archie and administered an informal Code of Practice brain stem test. I heard evidence from Dr Playfor who recommended that the formal Code of Practice brain stem test should take place.

22. Archie's mother alleged that evening that he had gone into hypotension after Dr Playfor's tests, so I also heard from Dr F, Archie's treating Consultant Paediatric Intensivist from the Royal London Hospital when it became clear from the extensive medical records that Archie had had no reaction at all to Dr Playfor's tests.

23. Having weighed up the risks I made an order that Archie be subject to brain stem testing using the approved test. The *ex tempore* judgment I gave on 13th May 2022 should be read in conjunction with this judgment.

24. On 16th May 2022, two independent intensivists working for different Trusts, Drs Q and E, attempted to administer the brain stem test. The test was not able to be performed because Archie did not react to the peripheral nerve stimulation tests which were a precursor to the brain stem test. Had the brain stem test then been performed the results may have provided a false negative result.

25. The brain stem test is the approved way to test for death by neurological criteria ("DNC"). The witnesses called by the Trust in the last few days said they had never had to consider before whether a patient was brain stem dead without being able to administer and rely on the results of the Code of Practice tests.

26. In view of the inability to carry out the brain stem test, the Guardian made an application that Archie be subjected to a further MRI scan of his brain and spine. This was opposed by the parents who were concerned about the risks to Archie. The purpose of this further test was to show what had been happening to Archie's brain between 15th April 2022 when the last MRI scan had taken place and 31st May 2022 when the new test was to be performed.

27. On 25th May 2022, I heard evidence from three treating consultant clinicians as to whether a further MRI scan should be undertaken with the considerable risks to Archie of doing so. The risks were in moving him through the hospital to the scan suite, his transfer onto the scan bed and then the risks in the scanning machine and when he was returned to the intensive care unit.

28. When cross-examined by Miss Gollop QC for the Guardian, each clinician consultant, a Consultant Neuroradiologist, a Consultant Paediatric Intensivist and a Consultant Neurologist agreed that it was likely or highly likely that Archie had died.

29. One of the three, Dr P, the treating Consultant Neuroradiologist, had said on 25th May 2022 that further MRI scans would show further necrosis (death) of Archie's brain.

30. On 27th May 2022 I ordered that the scans should take place. Dr P provided a further statement, a report, the images and evidence based on the 31st May 2022 MRI scan.

31. Leading up to the final hearing on 6th June 2022, the parents made an application for the matter to be in open Court. The Trust provided a statement which explained their position that the proceedings should be in closed Court but should be reported subject to the RRO. In the event, I gave a short judgment on 6th June 2022 setting out the reasons why the hearing should be held in closed Court with journalists being able to report on the hearing as before.

The Final Hearing

Preliminary applications

32. On Monday 6th June 2022 this matter was listed for evidence to be heard from the experts including an expert instructed by the parents to enable the Court to reach a decision on the applications made by the Trust.

33. Mr Quintavalle raised two preliminary matters on behalf of the Respondent parents. The first, was their concern that the scans of Archie's brain and spine produced by Dr P were not images of Archie but of someone else.

34. The second was the parents' concern that the hospital was purposefully starving Archie. He informed the Court that he may be instructed to apply for an Emergency Protection Order in both regards.

35. In relation to the first contention, I heard from Dr P who explained why it was impossible for the scans to be anyone's other than Archie's. He had been watching the scans on a monitor as the images were taken, he had then checked them again four times in the days that followed. Each of the 1000 or so images were automatically marked with Archie's name, date of birth and his unique NHS number or hospital number.

36. I have noted from bundle 3 of the medical records (page 1877) that on 31st May 2022 before the MRI scan was carried out, Archie's mother had said that the scans she had seen had not had Archie's name on them. A medical professional had then taken the mother to the PACS system which is the computer system which stores all NHS scans and shown Archie's mother that every scan that had ever been taken of Archie had his name and details on it.

37. A day later, after the up-to-date scans were taken I noted from the medical records that on 1st June 2022 at about 6pm or so the mother asked a medical professional if she could see the MRI scan images to check that Archie's name was on them (bundle 3 page 1948). She was shown some images of his brain and spine from the day before. They all had his name on them.

38. The parents' first concern lacked any basis in fact. I could understand why Archie's mother was so concerned. This was because Dr P had produced with his statement cropped photocopies of the scans which removed Archie's name and details. The mother had been told on 31st May and 1st June that all scan images have the patient's name and details on it but in the circumstances this family is in, it was understandable that she could not remember this taking place.

39. The parents' second concern was also unsustainable. The family's suggestion amounted to an extremely serious accusation, made through Mr Quintavalle, their counsel, that the Royal London Hospital was starving Archie.

40. Dr F explained the many difficulties the hospital was having in feeding Archie who suffers significant diarrhoea from time to time. A dietician is involved in his care and tells the intensivists how much nutrients he needs to take. Detailed and careful measurement of his 'input' and 'output' are taken. The recommendation of the dietician is for him to have 1200 calories and 54 grams of protein a day. Dr F explained this was to keep him properly nourished.

41. In Archie's case, Dr F explained that the specialised liquid food goes in and then is absorbed into the intestine but before they reach the desired measurement of

50mls an hour he develops significant diarrhoea to such an extent that he loses large amounts of fluid from his body, more fluid than he is taking in. It had been a significant issue in the past few weeks.

42. When it happens, they try and give gut rest for a number of hours, to see if the diarrhoea will settle down. Once it has stopped, they gradually reintroduce feeding. They start with dioralyte, build it up and gradually reintroduce the specialised liquid food.

43. Dr F explained the brain injury is a trigger for diarrhoea because the brain and gastrointestinal system communicate with each other via the enteric nervous system, throughout the gastro-intestinal tract. Archie's brain injury means that normal signals are not getting to his gut.

44. I noted in the medical notes at bundle 3 page 1969 that on 2nd June 2022 Archie's mother was concerned about his nutrition and a Consultant explained to her that Archie needed gut rest as he was not absorbing his food. Later that same night a nurse heard the mother speaking over the telephone to someone saying that the hospital was starving Archie (page 1980). This was the background to the second concern raised by Mr Quintavalle on the parents' behalf.

45. In the end, having heard the evidence of Drs P and F, and after the very sensible suggestion was made by the Guardian that the witnesses and Archie's parents have a discussion over the lunch hour mediated by the Guardian, Mr Quintavalle did not apply for an Emergency Protection Order.

46. The desperation of the parents is perhaps shown by the two preliminary matters raised. Neither complaint had any foundation. From the evidence I have heard

and read, including now a number of the thousands of pages of medical records, I consider the hospital care provided to Archie, whether by the clinicians or the nursing staff, has been exemplary.

47. The two issues raised show clearly the lack of trust the family has in the very experienced clinicians caring for Archie. I noted from the nursing notes found in the medical records that Archie's mother preferred to search for answers on the internet or from people who had contacted her rather than accepting what the specialist doctors treating Archie and who have care of him on a daily basis were saying. I have had no reason to doubt over the last three weeks when I have heard evidence on three occasions from the three main clinicians treating Archie that they want what is best for him.

48. We can all understand on a human level the mother's desperation, but I did not accept that these experienced doctors were not worthy of her trust.

Evidence

49. I read statements and heard evidence from specialists at the Royal London Hospital who had been responsible for Archie's care including Dr P, the Consultant Paediatric Neuroradiologist who had organised the MRI scan of 31st May 2022, had seen the scans as they were shown 'in real time' on the monitor in the control room, reported on them, exhibited some of the images taken on that date and compared Archie's brain with the brain of another child of a similar age without brain damage.

50. I heard from Dr Z, the Consultant Paediatric Neurologist, and, Dr F, Archie's Consultant Paediatric Intensivist. I then heard from Ella Carter, who is the

fiancée of Archie's brother Tom who spoke movingly about Archie and the family's views and beliefs.

51. The final witness was Dr Shewmon who relied on his report of 5th June 2022. With great knowledge and experience he commented on the different ways that death is diagnosed in the US and in the UK. He set out the weaknesses in the procedures used.

52. He could give only limited assistance in relation to Archie's brain injury and his particular circumstances as he had not seen the scans.

Chronology

53. In view of the lack of a brain stem death test I have concentrated on the evidence of the views of clinicians obtained in the course of Archie's admission into hospital, first at Southend and very soon afterwards at the Royal London.

54. On 7th April 2022 Archie underwent a CT scan at Southend Hospital. There were changes consistent with hypoxic (lacking or low oxygen) brain injury. He was transferred to the Paediatric Intensive Care Unit at the Royal London Hospital.

55. On 8th April 2022 an EEG (electroencephalogram) was performed. This measures electrical activity in the brain. Dr Z said the findings suggested "severe dysfunction caused by injury to the brain but do not show any ongoing seizure activity".

56. On the same day a CT scan was performed. There was evidence of severe hypoxic ischaemic encephalopathy ("HIE"). In other words, there was a brain

disorder or injury caused when the brain does not receive enough oxygen or blood flow for a period of time. This was affecting "the deep grey matter as well as the cortical mantle of the cerebral hemispheres and subcortically in the cerebellum consistent with asphyxia related to hanging. Generalised associated cerebral swelling is effacing the basal cisterns but there is no cerebellar tonsillar herniation present. There is no traumatic vascular dissection injury of the neck vessels and there is satisfactory enhancement of the intracranial anterior and posterior circulation vessels present…".

57. On 8th April 2022 Archie underwent a CT angiogram that showed blood was flowing into his brain. This was to rule out injury to the blood vessels in the head and neck and no serious injury was found. The conclusion of the radiologists in relation to the CT head scan and CT angiogram was that their findings were consistent with "1. Worsening of cerebral and cerebellar oedema with increasing tonsillar herniation in devastating hypoxic ischaemic brain injury and 2. Patent intracranial injuries".

58. On 8th April 2022 he was showing signs of diabetes insipidus ("DI") which can result from severe trauma. DI causes very high levels of sodium with severe dehydration due to his kidneys excreting a lot of dilute urine.

59. On 9th April 2022 Cerebral Function Monitoring ("CFM") showed changes consistent with right-sided seizure activity consistent with elevation of blood pressure and heart rate.

60. On 10th April 2022, a CT scan of Archie's head and CT angiogram were performed. The findings were of increased brain swelling compared to the

earlier CT scan and further evidence of injury to the cortex which controls most higher cognitive, sensory and motor functions and cerebellum (movement and co-ordination). They suggested that there had been a "significant injury to multiple areas of the brain and that Archie had sustained a global injury". Dr Z went on to say: "There is evidence that the brain swelling is starting to push the brain stem against the base of the skull, but the cerebellar tonsils have not yet been pushed through the foramen magnum (the opening at the base of the skull where the spinal cord exits). The CT angiogram appears to show that the blood vessels within the skull have some flow within them…".

61. On 11th April 2022, a second opinion was obtained. This was from a Consultant and Clinical Lead in the Adult Critical Care Unit at Royal London Hospital. He saw Archie, reviewed his case and looked at the notes, images, blood results etc. He confirmed that the history, examination and investigations were all consistent with the diagnosis of severe hypoxic ischaemic encephalopathy. He said it would be appropriate to proceed to brain stem death testing. He went on to say that if the test did not demonstrate brain stem death, he did not think continued treatment would be in Archie's best interests. Dr M said "The extent of brain injury is incompatible with any meaningful recovery".

62. On 14th April 2022, a further second opinion was obtained, this time from outside the Trust from Dr X, a Consultant in Neuro Intensive Care Medicine and Anaesthesia from Queen's Hospital, Romford. This specialist did not examine Archie but looked at the reports of the clinical imaging. He also discussed Archie with Dr Edmonds the then treating Consultant.

63. Dr X said Archie had suffered a "devastating hypoxic brain injury caused by the hanging. His prognosis is very poor and he is unfortunately unlikely to survive". He recommended the involvement of the palliative care team with a view to implementing a Do Not Resuscitate Order.

64. Dr X predicted there may be a difficulty with a brain stem test. He said if they were unable to perform brain stem testing "then consider the following ancillary tests to give support to a withdrawal decision if he shows no sign of improvement: 1. Repeating the EEG. 2. Either performing a Brain MRI (DWI) or repeating the CT head and angiogram". This was on 14th April 2022, later all of these tests were repeated.

65. On 14th April 2022 a second EEG was performed over 30 minutes. Archie was stimulated but there was no response.

66. On 14th April 2022, a Multi-Disciplinary Meeting was held with the parents when Archie's very severe situation was outlined to the parents and Ms Carter. The PICU Consultant recommended brain stem testing to confirm their suspicions that he had died. Ms Carter asked for a further month for the family to see if Archie could recover.

67. On 15th April 2022 Magnetic Resonance Imaging ("MRI") of Archie's brain took place as well as Magnetic Resonance Angiography ("MRA") to look at the blood vessels. Dr Z said this showed "severe hypoxic-ischaemic injury (injury caused by lack of blood and oxygen supply) affecting the entire brain – cortex, midbrain, brain stem and cerebellum. There is associated swelling of the entire brain and the cerebellar tonsils have now been pushed through the foramen

magnum compressing the brain stem. On the MRA no blood flow can be detected within any of the intracranial blood vessels. This represents a further deterioration compared to his earlier CT scans.

68. The "coning" was said by Dr P to be "a very reliable marker for a point-of-no-return for brain stem function…The MR angiography performed on Archie showed the absence of blood circulation to the brain inside the skull…".

69. Dr E, the independent Consultant in Paediatric Intensive Care who had been brought in to conduct the brain stem test and who saw the MRI scan of 15th April 2022 said it was a devastating scan. The whole of the brain showed evidence of extreme oxygen starvation. The brain had coned which destroys the brain stem and there was a lack of blood flow to the brain.

70. On 15th April 2022 a second opinion was obtained from Dr K, a Consultant in Paediatric Intensive Care from another well recognised London teaching hospital. He read Archie's notes, met him and his parents and the team and looked at his neuro-imaging including the scans taken earlier on that day. He said that it was clear that Archie had sustained a severe irreversible brain injury. There was no therapeutic option that could help him at this stage.

71. Dr K said he and his colleagues would not have done anything different to the Royal London team. He recommended that brain death testing be performed on Archie and if confirmed he would recommend stopping mechanical ventilation. Even if the tests did not confirm brain death, given the clinical situation, "we would likely recommend stopping invasive mechanical support

as being in Archie's best interests, given the severity of the brain injury he has sadly suffered".

72. On 20th April 2022 a third EEG was performed. This was when music Archie liked and audio recordings of boxers he admired were played to him. There was no response, and no cortical activity was seen.

73. On 6th May 2022 Dr Z performed a neurological examination. He said "it has become "even clearer that Archie has suffered a very severe and, in my opinion, irrecoverable brain injury and is very likely to be brain dead. Even should he prove to have some residual brain stem function, his prognosis remains very poor and he is very likely to remain in a comatose or vegetative state and dependent on mechanical ventilation for the rest of his life".

74. On 9th May 2022, Dr Q, a Consultant Paediatric Neurologist from another well recognised London teaching hospital was asked for a second opinion. He has seen reports of CT brain scans, MRI scans of the brain and blood vessels and the reports of a series of EEGs performed on Archie. Taking all the information together he was of the view that Archie had a "very poor prognosis and has sustained an irreversible hypoxic brain injury". He said if Archie was at his hospital they would carry out brain stem testing to assist further decisions in relation to his care.

75. On 9th May 2022 Dr Playfor examined Archie. He was entirely unresponsive. The independent Consultant Intensivist carried out reflex and other tests followed by an informal two-minute apnoea test. He thought if formally tested

Archie would meet the criteria necessary to determine death according to neurological criteria.

76. In his view given in a report dated 10th May he said that Archie fulfilled the criteria, that the severity of his condition was such that it would be difficult or impossible for him to derive benefit from continued life. Dr Playfor said it "is therefore entirely appropriate to consider the withdrawal of LST" [Life Sustaining Treatment]. He went on to say that "even if some residual brain stem function were demonstrated, I cannot envisage any scenario where Archie could demonstrate any meaningful recovery". He could not see any additional treatments which would be in Archie's best interests.

77. On 11th May 2022 a repeat CT angiogram took place which showed that blood was not flowing into the brain. Dr E said it showed a "complete lack of blood flow to the brain". Without blood flow, the brain could not survive or heal.

78. On 16th May 2022, Dr Q and Dr E performed a peripheral nerve stimulation test on Archie as a precursor to the brain stem test the Court had ordered on 13th May 2022.

79. Dr E is a Consultant in Paediatric Intensive Care. He has been a consultant since 2006 and is often asked to assess patients for a second opinion. He examined a number of Archie's scans, various reports and met his family.

80. His view was that "Archie has extremely severe brain damage, which is unsurvivable. I make this diagnosis based on the history, examination, investigations and progressions of the case. Brain stem death testing can be used to confirm this. It does not alter his prognosis. Even if brain stem testing

shows that there is some residual brain stem function, this does not change the overall picture".

81. On 25th May 2022, Dr P, Dr F and Dr Z gave evidence before me. They all said that Archie was either likely or very likely to be brain dead. Nothing that had happened since their statements had been written changed their opinions.

82. Dr F, Archie's Treating Consultant Paediatric Intensivist confirmed in her evidence on 25th May 2022 that taking into account the mechanism of injury, Archie's unresponsive condition and the severe coning seen on the MRI scans of 15th April 2022, in the view of the professionals in the paediatric intensive care specialism, the nursing staff, neurology, neuroradiology and endocrinology it was likely that Archie's brain stem had died between 8th and 26th April 2022.

83. On 31st May 2022, by this Court's order a further MRI scan was undertaken of Archie's brain and spine. I deal with the MRI scan of 31st May in more detail below.

84. On 4th June 2022, in view of the statement from Ms Carter that Archie was gripping his mother's fingers and producing tears, Dr Z conducted a brief neurological examination of Archie. Sadly, he found no movement when he reproduced the scenarios of the videos.

<u>The MRI scan of 31st May 2022</u>

85. The evidence Dr P gave was based on an examination on five occasions of about 1000 to 2000 images taken of Archie's brain and spine from various angles. He was watching the scans on the monitor in the control room as the scanning was

taking place. Later the same day he looked at the scans again as he prepared his report. He then checked the scans three more times, including once the day before giving evidence.

86. He exhibited four pages of images he had chosen and attempted to show the Court the difference between Archie's brain and what he called a 'normal' brain of another child of a similar age. There were a number of fairly clear differences but sometimes the differences were subtle and not immediately clear working from photocopies. Overall, Dr P's explanation supported by the images he had had taken was compelling.

87. The Consultant Neuroradiologist reported that there had been global shrinkage of Archie's brain since the last MRI scan of 15th April 2022. There had been development of fluid overlying the brain inside the skull. The abnormal appearance of great and white matter continued and had become worse since the earlier MRI.

88. There was severe damage to the deep centre of the brain including to the thalamus. The severe coning seen on 15th April 2022 had not changed. The cerebellar tonsils which had been squashed together with the lower part of the brain stem and had herniated through the bottom of the skull remained but there were signs now of necrosis (death or decay). There were signs of necrosis of the medulla and it was now shrunken. Dr P explained that this is the lower part of the brain stem which controls breathing and heartbeat.

89. There was still the absence of blood circulation through the larger arteries that supplied blood to the front and back of the brain.

90. In terms of the spine there was no evidence of primary injury to the spine, something Archie's parents had been very concerned about but the clinician observed that there was evidence of necrosis of the front part of the thoracic spinal cord. He thought that looked related to a loss of blood supply. He observed further necrosis lower down the spine in the lumbar region and also found "necrotic debris" caused when necrotic tissue has shed higher up in the spinal cord.

91. In summary Dr P's evidence to the Court on 6th June 2022 was that Archie's loss of brain volume was caused by an atrophy of the brain and this was consistent with it not getting oxygen. The development of fluid in the skull was as a consequence of the deprivation of blood supply and oxygen. He said that the brain tissue was beginning to issue fluid and it was gathering in a compartment where it would not normally be expected to be present. There had been a number of changes since 15th April 2022 and certainly no improvements in the appearance of the brain structures.

92. Dr P was asked particularly about the thalamus as that was a hugely important area involved in vision, speech and in consciousness. It is also involved in movement of limbs and sensation. He said the areas of damage were much more marked and there had been a progression of damage.

93. He was asked about the brain stem. He said it remained in an abnormal position at the top of the spinal canal. The structures had changed between the two scans. There was necrosis of the brain stem. He said somewhere between 10 and 20% of the brain stem had undergone necrosis but that damage to the brain stem was

over 50%. The necrosis was caused by the squashing of the brain stem and the coning into the top of the spinal cord.

94. Dr P was asked if the necrosis would continue and he said that there was probably not much more that could occur. In his experience, from the scans, Archie had reached the point of no return. The sort of images he was seeing were ones he usually saw at perimortem or postmortem.

95. Dr P's evidence was followed by the evidence of the specialists Dr Z and Dr F. Their evidence made bleak hearing for the family and the Court. There were no signs of recovery, and the evidence was that there was a deterioration. I have set out above Dr F's evidence about Archie's diarrhoea. She also spoke about the problems he has with his urine output which fluctuates to such an extent that he needs hourly calculations as to how much vasopressin he requires.

Ms Carter's evidence

96. From the family, I had the evidence of Ms Ella Carter who is engaged to Archie's older brother and who had become the family's spokesperson or advocate in recent weeks. She had provided a number of statements and gave oral evidence to the Court. She was careful in her evidence, articulate, honest and a great credit to the family.

97. Ms Carter provided important information which I take into account in the anxious consideration I must give to the evidence concerning the declaration of death. She also gives important evidence in relation to a best interests decision. I consider her evidence below.

98. From her first statement of 4th May 2022 she explained that the family accepted that Archie was "likely to have sustained irreparable brain damage" but his mother hoped that he may make a recovery of some kind. At that point, the family thought there was a chance Archie would come home again but accepted he may be severely disabled or in a severely vegetative state but this "was better than nothing". They were hoping and praying for a miracle.

99. Ms Carter accepted that if Archie was brain stem dead then he could not recover and there would be no point in providing him with mechanical ventilation. At the same time Ms Carter questioned the reliability of the brain stem death test and whether the final apnoea part of the test was too much of a risk for Archie.

100. On 4th May the family objected to the position taken by the hospital within three days of their arrival that he was not going to make it through. The family were very upset that a Consultant had raised the question of organ donation at this very early stage of Archie's admission.

101. In the same statement of 4th May 2022 Ms Carter explained why the family had refused mediation, this was because they were not prepared to have the brain stem tests done. She said that having received legal advice, their attitude to mediation had changed.

102. In Ms Carter's next statement of 10th May 2022, she said that historically, the family's religious beliefs had been "vaguely Christian" but that they had never been regular church goers.

103. Archie then became more seriously attracted to Christianity because of his involvement with Mixed Martial Arts, the full-contact combat sport. Many of

the boxers were Christians and they pray before they go into the ring. Archie had saved up for and then begun wearing a small cross and a St Christopher's ring in the two years before the accident.

104. Archie had been speaking about being baptised and wanted his mother to take him to a church service at Christmas. This led to the family having Archie christened as he lay unconscious. Archie's mother, brother and sister were christened then on Easter Sunday at the hospital.

105. Through the family's Facebook page created to support Archie the family organised a communal live prayer for him every Sunday.

106. In her third statement Ms Carter sets out Archie's family's view that death occurs when the heart stops beating. She pointed out Archie's views which she said were that he would only be dead when his heart and breathing had stopped.

107. She felt that not enough time has been spent talking to the family about their growing religious views. She said Archie should be given an opportunity to recover. In her evidence she explained that whereas his older brother Tom had said he would not wish to be kept alive on life support, Archie had told his mother that he would want to remain on life support because he would not want to leave her.

108. Ms Carter said that Archie had a personal faith. He had told his mother he had wanted to repent of his sin. He was frightened of the concept of hell and did not want to risk going there. Archie's mother had herself attended Sunday school and had brought up her children with a Christian sense of what is right and what is wrong. When he was about six or seven he used to pray that his

parents would get back together again. He used to tell his mother he would like to get baptised and although he had lost interest slightly during primary school he had noticed that MMA practitioners would pray for protection before a fight.

109. In terms of evidence which might be relevant to the declaration of death I am being asked to make, in her statement of 10th May 2022, Ms Carter explained that Archie throughout his stay in RLH "grasps and squeezes Hollie's fingers when she puts her hand, or her fingers, into his palm, and then lifts her hand. Sometimes he squeezes her hand so strongly that his knuckles go white". She said that happened a number of times a day.

110. On 1st June 2022, Ms Carter produced photographs and videos of what Ms Carter said was Archie gripping his mother and sister's hands.

111. Ms Carter reported further that on 7th May the colour of his eyes returned and from 8th May "he began to open his eyes spontaneously". On 8th May, Archie's mother saw him opening one of his eyes six times. On 9th May 2022 he opened both eyes a number of times. On 1st June 2022 Ms Carter attached videos of Archie which she said showed Archie opening and shutting his eyes.

112. There were photographs and videos showing Archie producing tears including when she said his ventilator tube was changed. She explained this was a painful procedure and "it seems like Archie experienced that pain as tears came out of his eyes".

113. Ms Carter also said that their family had observed Archie gulp and seen his eyes flicker. She said Archie's pupils had not been fixed and dilated quite often.

114. I watched the videos and photographs of Archie provided by Ms Carter. I went back through the medical notes. I considered the evidence of Dr Z and Dr F both of whom had tried to replicate what the mother had told Ms Carter had happened.

115. In the videos that I saw there was indeed a tear at the corner of one of Archie's eyes. He had wet eyelashes. Sadly, it did not show tears falling or signs of him crying or moving.

116. I remembered too, the hospital evidence that the ventilator tube is never replaced and therefore would not produce the pain mentioned by the family as possibly causing a tear. I heard too that Archie's pupils are examined by a pupilometer several times a day and he has to be given eye drops four times a day to prevent his eyes from drying out when the eyelids are lifted and drops put in. There has not been a change in the dilation of fixation of his pupils for many weeks. .

117. A tear could well have been a by-product of the eye drop procedure. No one else had seen his eyes opening of their own accord although his eyelids would have had to be lifted to insert the drops.

118. In the video of him holding his mother's hand, there was no movement that I saw of Archie's hand. A grip suggests an effort being made but what I saw was Archie's hand curled around in a 'C' shape unmoving in each video. His mother moved her hand and it is true that his hand went up when hers did but he was not moving consciously.

119. Very sadly, despite the 24/7 nursing care there is no mention in the notes of any movement made by Archie, whether of his eyes, or his hands. I cannot say that

the mother may not have felt him tighten his grip on her hand, all I can say is that it does not seem to be a conscious movement and it is not one shown on the videos that I was provided with.

120. In evidence Ms Carter said she had not herself seen Archie opening his eyes or letting a tear fall nor had she felt a grip but she had been told about this by Archie's mother.

121. The final witness was Dr Shewmon from the US. A man of expertise and considerable standing, instructed by the parents, he made a statement dated 5th June 2022, the day before the final hearing started. I was grateful for his industry. An undoubted expert in the field, he explained how the standard for death differed in the UK to that in the US. The US used whole brain death test whilst the UK concentrated on the brain stem.

122. Dr Shewmon gave examples of children or young people who had been found brain dead but who had made some sort of recovery. He had written extensively about these occurrences.

123. Overall, I found his evidence interesting but where as in Archie's case, the brain stem death test had not been able to be administered or relied upon, his evidence was not quite so relevant. Examples of 'miracle' recoveries again were not helpful. I noted that unsurprisingly he had not seen the scans in Archie's case which showed a deterioration in the condition of his brain between 15th April 2022 and 31st May 2022. In all the circumstances, his evidence did not undermine the evidence I heard from the Archie's treating clinicians as supported by the second opinions I read. The clinicians had immediate

knowledge of Archie's medical condition and were able to examine him, his notes and the scans, this put them in a far better position than Dr Shewmon.

Arguments

124. Mr Quintavalle, for the First and Second Respondents, who clearly has much expertise in this difficult area of law submitted that the standard of proof that I had to apply was the criminal standard. He contended that before I could declare Archie was dead, I had to be sure beyond reasonable doubt that he was dead. Counsel for the parents tried to persuade the Court to ignore recent authorities which suggested the usual civil standard should apply. He accepted the standard was on the balance of probabilities when it came to the best interests test.

125. Mr Quintavalle explained that a proof of death beyond reasonable doubt, accords with medical practice, with domestic authority in civil matters where constitutional rights are at stake and with the standard imposed by the ECtHR in Article 2 cases.

126. In medical practice he asserted, and I accepted this was the case, that when certifying death medical practitioners do so beyond reasonable doubt. Mr Quintavalle argued that Courts should not apply a lesser standard.

127. In terms of domestic authorities, he relied on authorities where in certain civil cases the Courts had adopted the criminal standard such as in contempt cases and breaches of the civil anti-social behaviour orders. He says a declaration of death is of such a nature that it is appropriate to apply the higher criminal standard.

128. He relied on Strasbourg cases where there are factual disputes involving the engagement of Articles 2 or 3 which are resolved by adopting the criminal standard of proof.

129. In his next argument, Mr Quintavalle considered the concept of death and argued that the Court should adopt a legal definition. He said the authorities which have appeared to one extent or another to have endorsed the neurological criteria of brain stem death are first instance decisions and not binding on this Court.

130. Mr Quintavalle relied on the evidence of Dr Shewmon (accepted by Dr Z) that dying is a continuum up to a certain point at which death occurs. The parents' argument was that if the Court adopted a neurological definition of death this would "extend the common law definition of death" and there was no uniformity of standard to describe brain death. The Code of Practice is continually being updated as the science advances.

131. In terms of best interests, Mr Quintavalle underlined the principle of the sanctity of life and the strong legal presumption in favour of preserving life. He said it requires the most compelling reasons to displace this. He relied on international law and the European Convention on Human Rights. Domestic law should be interpreted in compliance with Treaty obligations.

132. He argued that it would be a violation of Archie's Article 2 rights if the Court permitted or ordered Archie's withdrawal from mechanical ventilation. He relied on the admissibility decision of *Gard v UK* (no. 39793/17) where the Court of its own motion decided to examine the compatibility of the withdrawal

of ventilation with Article 2. It found it compatible. Mr Quintavalle pointed out that the Court approached the question from a procedural standpoint and did not consider the substantive issue.

133. He also relied on Article 6 of the UN Convention of the Rights of the Child ("UNCRC") which sets out every child's inherent right to life and the obligation on contracting States to ensure the survival and development of the child. A withdrawal of treatment would breach these rights.

134. Finally, in terms of the Conventions he relied on Article 10 of the UN Convention on the Rights of Persons with Disabilities, ("UNCRPD") which reaffirms the inherent right to life of every human being and the taking of all measures to ensure its effective enjoyment by persons with disabilities on an equal basis with others. He said had not been directly incorporated into UK law but he noted that the UK was fully committed to the Convention rights of disabled people.

135. Mr Quintavalle did not argue vigorously that the doctor's conclusions in relation to Archie were wrong. He explained instead, the parents' position which perhaps had changed or at least become more nuanced after hearing the evidence from the three specialist consultants. The parents recognised that barring a miracle, which they were praying for, they were not going to bring Archie home and that he was likely to die in the hospital in the days and weeks ahead.

136. In his position statement for the Final Hearing and in his oral argument Mr Quintavalle was critical of the lack of consideration of Archie's circumstances

by a hospital Ethics Committee. The only evidence relating to this was when Archie's situation was considered by the "Barts Ethics Rapid Case Review Group".

137. He relied on recent cases where the importance of a consideration of a patient's position by an Ethics Committee Meeting was underlined *(Re AA* [2014] EWHC 4861 (Fam) and *Great Ormond Street Hospital for Children NHS Foundation Trust v MX and others* [2020] EWHC 1958 (Fam). He was critical of the fact that the parents were not involved in the interim ethics review which took place and that no attempt had been made to understand or consider their views and values.

138. In this case I had the unchallenged evidence from Ms Carter about the Christian values of Archie and his family. I could not see that I would have been assisted by a further consideration of Archie and his situation by a meeting of a full Ethics Committee. The hospital's position was clear, that it was likely or highly likely Archie was dead. Very sadly, from the hospital's perspective this was not a situation of a very disabled child and the ethical considerations arising. As I make clear below, I take into account the views and values of the family when I come to consider Archie's best interests.

139. Another criticism made of the Trust was that mediation should have taken place after it had been refused in April by the family. In his closing submissions Mr Quintavalle suggested, for the first time and much to the surprise of counsel for the Trust and the Guardian, that the family might agree to the withdrawal of all medication being administered to Archie but that without mediation the Trust

had not been able to find this out. In the event it was too late for such mediation to take place.

140. On the face of it mediation had been refused at an early stage and then Archie's situation was brought to Court. Although it was a 'nice thought' that mediation might work, I was not convinced with the polarity of the Trust and the parents' positions that it would lead to a conclusion which was acceptable to both parties.

141. Finally, Mr Quintavalle made an unwarranted criticism of the Guardian and suggested that Archie's position was not before the court. Miss Gollop QC dealt with this swiftly, she reminded the Court of the Guardian's earlier report and read for Mr Quintavalle's benefit the first paragraph of her position statement for the Final Hearing. The Court heard no more about it.

142. Counsel for the Trust and Guardian objected to Mr Quintavalle's suggestion that the Court might be extending the common law definition of death if it made a declaration of death in Archie's case. They said that the legal test for death is "settled and certain" (Miss Gollop QC Final Submissions paragraph 4). The Court is bound by *Airedale NHS v Bland* [1993] AC 789 which makes clear the legal criteria for death is brain stem death. This was confirmed most recently by the Court of Appeal in *Re M.*

143. The Trust and Guardian both submitted in writing and orally that the correct standard of proof was on the balance of probabilities with anxious consideration being given to the evidence.

144. This was addressed in *Re M* by Lieven J who said at paragraph 35 of her judgment that "the standard of proof is the balance of probabilities but the Court should apply anxious scrutiny to the evidence".

145. The judgment in *Re M* was considered by the Court of Appeal in a permission hearing. The parties (including Mr Quintavalle who was instructed in the case) had agreed it was the correct standard of proof so this was not raised as an issue before the Court of Appeal. Miss Gollop QC contended that had it been the wrong standard that Lieven J had applied the Court of Appeal may well have questioned or commented on this.

146. Ms Paterson and Miss Gollop QC considered the question of the standard of proof. In reply to Mr Quintavalle's argument that the question of Archie being alive or dead required a higher standard of proof than the civil standard, both answered a resounding no.

147. Counsel for the Trust and Guardian drew the distinction between civil proceedings which may be followed by a criminal or punitive sanction and protective proceedings. The purpose of the applications in these proceedings is to protect Archie's dignity in death by providing the declaration that he is dead or if found not to be dead to protect his welfare by deciding what is in his best interests.

The Law

148. It is in the context of the arguments set out above that I consider the law I should apply in relation to the two applications.

149. The first question for the court is whether Archie is brain dead. Mr Quintavalle has argued that brain stem death is not the definition I should apply. Brain stem death became the legal definition of death in the House of Lords case of *Bland*.

150. I accept that the Codes of Practice applied to determine brain stem death are regularly updated to reflect the development of science. I accept too that Dr Shewmon was critical of the brain stem death test adopted in this country (and also critical of the whole brain death test used in the US) but in this case no brain stem test was able to be administered. I have considered carefully Mr Quintavalle's interesting submissions.

151. I have relied on recent authorities, in particular *Manchester University NHS Foundation Trust v Midrar Namiq* [2020] EWCH 180 (Fam) ("*Re M*"), in which the Trust applied for a declaration that it was lawful in relation to a baby to have mechanical ventilation removed, the test for death by neurological criteria was examined. In that case, brain stem tests were administered, and the Court found that the baby had died by neurological criteria.

152. The case was considered by the Court of Appeal consisting of Sir Andrew McFarlane (P), King LJ and Patten LJ in *Re M (Declaration of Death of Child)* [2020] EWCA Civ 164. It was a permission to appeal hearing at which permission was refused. Mr Quintavalle contended I should not be guided by that case. I disagree, the President made it clear that the Judgment was for wider dissemination given the importance of the issues raised.

153. The decision made clear that the test for death is settled. At paragraphs 91 and 92 the Court said:

> "91. Firstly, as a matter of law, it is the case that brain stem death is established as the legal criteria in the United Kingdom by the House of Lord's decision in Bland. It is not, therefore, open to this court to contemplate a different test.
>
> 92. Secondly, as, I think, Lord Brennan accepted, it is, in reality, impossible for this court now to embark upon an assessment of whether a different test, namely that adopted in the USA, should replace the long established UK criteria represented in modern times, by the 2008 Code and the 2015 guidance."

154. In my judgment, I must apply the brain stem death test as I am bound by the House of Lord's decision in *Bland.* There is no authority which has followed *Bland* which suggests I should adopt a different test. I do not accept by adopting this test I am extending the common law definition of death. The different factual background in Archie's case compared to other authorities is that because of Archie's severe brain injury the Court is not able to rely on the results of the Code of Practice brain stem death test. The Court has to consider the evidence provided by the clinicians.

155. The next question raised by Mr Quintavalle's in his submissions is the standard of proof this Court should apply.

156. Mr Quintavalle has provided a number of reasons why this Court should apply the criminal standard of proof. I have considered the authorities he relies on and the relevant Conventions. I understand on the human level why the parents should feel that a balance of probabilities does not protect Archie sufficiently. Nevertheless, the law is settled and clear. I accept the Trust and the Guardian's arguments that the Court is considering making a protective order.

157. I have found it useful to consider Lieven J's recent case of *Re M* (above) where at paragraph 33 she accepted Mr Quintavalle's argument that "the question of

whether the criteria are met should be approached with “anxious scrutiny”. She then says that in deciding whether a patient is dead and their ventilator removed “it must be the case that the Court applies a very careful approach”.

158. So far as my approach to the application, I adopt Lieven J’s approach as set out in her paragraph 35:

> “For these reasons the approach I will apply below is that (1) the burden of proof is on the Trust; (2) the standard of proof is the balance of probabilities, but the Court should apply anxious scrutiny to the evidence; (3) no best interests analysis is appropriate.”

159. In Archie’s case, ‘anxious scrutiny’ is particularly apposite where the brain stem test could not be used to determine death.

160. If I am unable to make a declaration that Archie is dead and he is still alive, I must consider whether it is in his best interests to remain mechanically ventilated.

Law in relation to the court’s approach to ‘best interests’

161. The legal principles were set out clearly by Baroness Hale in the case of *Aintree University Hospital NHS Foundation Trust v James* [2013] UKSC 67, [2014] AC 591. This was a case involving an adult patient receiving clinically assisted nutrition and hydration.

162. At paragraph 22, Baroness Hale said:

> "Hence the focus is on whether it is in the patient's best interests to give the treatment rather than whether it is in his best interests to withhold or withdraw it. If the treatment is not in his best interests, the court will not be able to give its consent on his behalf and it will follow that it will be lawful to withhold or withdraw it. Indeed, it will follow that it will not be lawful to give it. It also follows that (provided of course they have acted reasonably and without

negligence) the clinical team will not be in breach of any duty toward the patient if they withhold or withdraw it."

163. At paragraph 39, Baroness Hale continued:

> “The most that can be said, therefore, is that in considering the best interests of this particular patient at this particular time, decision-makers must look at his welfare in the widest sense, not just medical but social and psychological; they must consider the nature of the medical treatment in question, what it involves and its prospects of success; they must consider what the outcome of that treatment for the patient is likely to be; they must try and put themselves in the place of the individual patient and ask what his attitude towards the treatment is or would be likely to be; and they must consult others who are looking after him or are interested in his welfare, in particular for their view of what his attitude would be."

164. The most recent consideration of the principles to be applied in children cases is to be found in *In Manchester University NHS Foundation Trust v Fixsler & Ors* [2021] EWHC 1426 (Fam) (28 May 2021) where MacDonald J provided a helpful summary of the application of the best interests’ test drawn from previous authorities.

165. At paragraph 57 he said:

> *“*As I have observed in previous cases, the legal framework that the court must apply in cases concerning the provision of medical treatment to children who are not 'Gillick' competent is well settled. The following key principles can be drawn from the authorities, in particular In *Re J (A Minor)(Wardship: Medical Treatment)* [1991] Fam 33, *R (Burke) v The General Medical Council* [2005] EWCA 1003, *An NHS Trust v MB* [2006] 2 FLR 319, *Wyatt v Portsmouth NHS Trust* [2006] 1 FLR 554, *Kirklees Council v RE and others* [2015] 1 FLR 1316 and *Yates and Gard v Great Ormond Street Hospital for Children NHS Foundation Trust* [2017] EWCA Civ 410:

i. The paramount consideration is the best interests of the child. The role of the court when exercising its jurisdiction is to take over the parents' duty to give or withhold consent in the best interests of the child. It is the role and duty of the court to do so and to exercise its own independent and objective judgment.

ii. The starting point is to consider the matter from the assumed point of view of the patient. The court must ask itself what the patient's attitude to treatment is or would be likely to be.

iii. The question for the court is whether, in the best interests of the child patient, a particular decision as to medical treatment should be taken. The term 'best interests' is used in its widest sense, to include every kind of consideration capable of bearing on the decision, this will include, but is not limited to, medical, emotional, sensory and instinctive considerations. The test is not a mathematical one, the court must do the best it can to balance all of the conflicting considerations in a particular case with a view to determining where the final balance lies. Within this context the wise words of Hedley J in Portsmouth NHS Trust v Wyatt and Wyatt, Southampton NHS Trust Intervening [2005] 1 FLR 21 should be recalled: "This case evokes some of the fundamental principles that undergird our humanity. They are not to be found in Acts of Parliament or decisions of the courts but in the deep recesses of the common psyche of humanity whether they be attributed to humanity being created in the image of God or whether it be simply a self-defining ethic of a generally acknowledged humanism."

iv. In reaching its decision the court is not bound to follow the clinical assessment of the doctors but must form its own view as to the child's best interests.

v. There is a strong presumption in favour of taking all steps to preserve life because the individual human instinct to survive is strong and must be presumed to be strong in the patient. The presumption however is not irrebuttable. It may be outweighed if the pleasures and the quality of life are sufficiently small and the pain and suffering and other burdens are sufficiently great.

vi. Within this context, the court must consider the nature of the medical treatment in question, what it involves and its prospects of success, including the likely outcome for the patient of that treatment.

vii. There will be cases where it is not in the best interests of the child to subject him or her to treatment that will cause increased suffering and produce no commensurate benefit, giving the fullest possible weight to the child's and mankind's desire to survive.

viii. Each case is fact specific and will turn entirely on the facts of the particular case.

ix. The views and opinions of both the doctors and the parents must be considered. The views of the parents may have particular value in circumstances where they know well their own child. However, the court must also be mindful that the views of the parents may, understandably, be coloured by emotion or sentiment. There is no requirement for the court to evaluate the reasonableness of the parents' case before it embarks upon deciding what is in the child's best interests. In this context, in *An NHS*

Trust v MB Holman J, in a passage endorsed by the Court of Appeal in Re A (A Child) [2016] EWCA 759, said as follows:

"The views and opinions of both the doctors and the parents must be carefully considered. Where, as in this case, the parents spend a great deal of time with their child, their views may have particular value because they know the patient and how he reacts so well; although the court needs to be mindful that the views of any parents may, very understandably, be coloured by their own emotion or sentiment. It is important to stress that the reference is to the views and opinions of the parents. Their own wishes, however understandable in human terms, are wholly irrelevant to consideration of the objective best interests of the child save to the extent in any given case that they may illuminate the quality and value to the child of the child/parent relationship."

x. The views of the child must be considered and be given appropriate weight in light of the child's age and understanding.

166. In the case of *Yates and Gard v Great Ormond Street Hospital for Children NHS Foundation Trust* [2017] EWCA Civ 410, McFarlane LJ again reiterated that: "As the authorities to which I have already made reference underline again and again, the sole principle is that the best interests of the child must prevail and that must apply even to cases where parents, for the best of motives, hold on to some alternative view."

167. The parents' proposal is that Archie should remain on mechanical ventilation within the hospital PCCU until he dies 'naturally'. They accept that this could happen in the coming weeks and months. In their closing submissions the family says that the fact that Archie feels no pain does not mean that his life has no value. They urge the court to analyse closely the values of Archie and his family which Mr Quintavalle says should be "the central determinative considerations in the best interests decision" (paragraph 56 Position Statement for Final Hearing).

168. The parents rely on *Raqeeb v Barts NHS Foundation Trust* [2019] EWCH 2531 (Admin) and [2019] EWHC 2530 (Fam) where they point out MacDonald J considered a situation where the child felt no pain. At paragraph 191 of the judgment MacDonald J says:

> "Within this context, and particularly where a child is not in pain and is not aware of his or her parlous situation, these cases can place the objective best interests test under some stress. Absent the fact of pain or the awareness of suffering, the answer to the objective best interests tests must be looked for in subjective or highly value laden ethical, moral or religious factors extrinsic to the child, such as futility (in its non-technical sense), dignity, the meaning of life and the principle of the sanctity of life, which factors mean different things to different people in a diverse, multicultural, multifaith society."

169. In contradistinction, the guardian has relied on the case of *Parfitt v Guy's and Thomas' Children's NHS Foundation Trust* [2021] EWCA Civ 362 where the court considered a case of best interests where the very young child had no capacity to feel pain. In particular I noted between paragraphs 60 to 62 Baker LJ said:

> 60. The proposition that no physical harm can be caused to a person with no conscious awareness seems to me to be plainly wrong. As I observed during the hearing, the law clearly recognises that physical harm can be caused to an unconscious person. In the criminal law, for example, an unconscious person can suffer actual or grievous bodily harm and it would be no defence to a charge under the Offences against the Person Act 1861 that the victim was unconscious. The judge was in my view entirely justified in citing examples from the law of tort in which it has been recognised that physical harm can be caused to an insensate person. As Mr Mylonas observed, if the proposition advanced on behalf of the appellant was correct, there would be no limit on a doctor's ability to perform any surgery upon any insensate patient. For my part, I fully endorse the judge's reasoning for rejecting the appellant's proposition at paragraph 76 of his judgment.
>
> 61. The judge's approach is entirely consistent with the observations of my Lady in *Re A*. By focussing on the presence or absence of pain and failing to recognise the physical harm which an insensate patient may suffer from her condition or treatment, a decision-maker may fail to consider the child's

welfare in its widest sense. Furthermore, so far as I can see, there is no support for the appellant's proposition to be derived from the judgment in *Raqeeb*. That case was decided on very different facts. Unlike Pippa, Tafida retained a minimal awareness, was in a stable condition, was not suffering life-threatening episodes of desaturations, and had received ventilation for a significantly shorter period. The level of support required by Tafida was not of the same degree of complexity and there was unanimity amongst all the doctors, including the treating clinicians, that she could be ventilated at home. Her condition and the treatments she received for it did not give rise to physical harm on the scale endured by Pippa in this case. In cross-examination, Dr Wallis acknowledged that the treatments given to Pippa were "on a spectrum of burdens". Furthermore, as demonstrated in the passages cited above from MacDonald J's judgment, the arguments advanced on behalf of the hospital trust in that case to the effect that it would be detrimental for Tafida to undergo the treatment proposed by her parents notwithstanding the fact that she could feel no pain were expressed in terms of dignity. In the present case, the Trust has not presented its arguments in those terms and the judge concluded that it would not assist him in this case to adopt any supposedly objective concept of dignity. In any event, it is worth noting that the argument presented to MacDonald J, as quoted in paragraph 176 of the judgment in *Raqeeb*,

"that even if Tafida feels no pain, further invasive treatment over an extended period of time will impose an unacceptable burden on her human dignity, which burden will be increased as she develops further debilitating physical symptoms"

acknowledged that there would be "physical symptoms" which would be "debilitating" even though she could feel no pain.

62. The judge was entitled to conclude Pippa could experience physical harm from her condition and medical treatment notwithstanding that she has no capacity to feel pain and no conscious awareness. There is no merit in the contrary proposition advanced on behalf of the appellant. I would refuse permission to appeal in respect of the first ground of appeal."

Conclusion

Is it probable that Archie is brain stem dead?

170. I have given anxious scrutiny to the evidence in the context of the law I have set out above.

171. There are no results from a brain stem death test carried out on Archie for the doctors to draw their conclusions from. The inability to administer the brain

stem test explains the Trust's original diffidence in its approach to the application where the Academy of Medical Royal Colleges 2008 Code of Practice for the Diagnosis and Confirmation of Death does not allow for death from neurological criteria to be considered other than via the six or seven step test.

172. The earlier authorities giving guidance on the correct approach to brain stem death have been based in recent years on the results of the brain stem death tests.

173. In my judgment, the lack of the test in Archie's case caused as it is by his very severe brain damage, does not prevent me from anxiously considering the abundant clinical evidence in these proceedings and coming to a conclusion as to whether I can find on the balance of probabilities that Archie is brain stem dead.

174. I have set out above a lengthy chronology which show the dates and the results of the various tests administered to Archie. The evidence in my judgment shows a gradual deterioration from very early on in Archie's admission into hospital when he had already suffered a very severe brain injury when blood supply and oxygen were prevented from reaching his brain.

175. The brain stem is needed to live an independent life, to breathe, to be conscious and to have a quality of life. Many body functions cannot be carried out without a functioning brain stem.

176. The 15th April 2022 MRI imaging showed how seriously Archie's brain was damaged. The MRA showed a lack of blood getting to the brain. By 31st May 2022, Dr P's earlier prediction to the Court that the next scan would show

continuing necrosis was proved correct. Archie's brain stem is squashed into the top of his spinal cord. Some decaying parts of the brain are seen to have dropped down Archie's spine and to be sitting in the lumbar region of his spinal cord.

177. Archie has been unconscious for eight weeks. Recently it is not just the fluid intake and output that has been difficult to control but he has lost 10 kilograms in weight. This is a substantial weight loss for a young boy when the expertise of the clinicians including a specialist dietician is concentrated on providing him with sufficient nutrition.

178. Archie cannot breathe without the support of a ventilator. Although Archie's bodily functions are being supported and continue, he will never regain consciousness. He is unmoving, he does not know where he is, he does not recognise his beloved family who are so devoted to him. Sadly, his mother's observations of his grip on her hand cannot be a conscious movement. He cannot feel pain, hunger or thirst. From the scans he is past the point of no return. He will not recover.

179. It is clear from the anxious and careful scrutiny of all the evidence including from clinicians with different specialisms from five separate hospitals that tragically on the balance of probabilities, Archie is dead. I make the declaration set out below.

Declaration

180. I find that Archie died at noon on 31st May 2022, which was shortly after the MRI scans taken that day. I find that irreversible cessation of brain stem function has been conclusively established.

181. I give permission to the medical professionals at the Royal London Hospital (1) to cease to ventilate mechanically Archie Battersbee; (2) to extubate Archie Battersbee; (3) to cease the administration of medication to Archie Battersbee and (4) not to attempt any cardio or pulmonary resuscitation on Archie Battersbee when cardiac output ceases or respiratory effort ceases.

182. The steps I have set out above are lawful.

Best Interests

183. Although I have found that Archie died on 31st May 2022, in deference to his parents' views I go on to consider his best interests as if I had not made that finding.

184. I have set out the law above. It is not in dispute that Archie lacks capacity to consent to or refuse medical treatment. In the circumstances where the parents do not agree with the Trust, it falls to the Court to decide what is in Archie's best interests.

185. The decision I have to make must be based on my assessment of Archie's best interests as his welfare, in the widest sense, is the paramount consideration. The principle of best interests encompasses medical, emotional and all other welfare issues.

186. I must look at all the evidence and take it into account including the evidence of his loving and devoted family particularly his mother who has spent day and night at his bedside and to whom Archie was particularly close.

187. I take into account the views of the doctors which I have set out above at length. A view that I also take into account is that of the nurses who have 24 hour care of Archie who have found the recent weeks an ethical strain that they have struggled with.

188. Although I take into account the parents' and the medical professionals' views, it is Archie's best interests which are my paramount consideration. I approach it with the point of view I assume he would have. As part of that, I bear in mind his burgeoning religious views which were of significance to him. Although he did not go to church he wears a cross and a St. Christopher's ring. In time his religious views may have developed.

189. I put in the balance on the one hand that Archie had told his mother he would not want to leave her and he had said that he would want to remain on life support rather than have that withdrawn. Archie was fit and he wanted a future in sport. He was on the national junior gymnastics team and had started MMA. I see in Archie a drive to preserve his life because his instinct to survive would have been strong. He loved being at the centre of and the youngest in his loving family.

190. On the other hand, I must ask myself what Archie's view might be of the treatment as it is being administered to him today. He is 12 and although he told his mother he would prefer to be on a life support machine rather than dead,

that was not an opinion he had come to based on the reality of the medical intervention he receives now and the likely outcome.

191. The tragedy of the situation is that Archie's life is unrecognisable compared to the one he lived just nine weeks ago. He cannot eat the food or drink he would have enjoyed. When thinking theoretically about medical support in these circumstances, I would not have expected Archie to take into account the many tube and line supports that have to be attached to his body, bringing nutrients in and taking his bodily products away. In terms of not wanting to leave his mother, tragically Archie does not know his mother is there and that she has spent the last eight weeks at his bedside when she was not at court.

192. It is accepted by all that Archie does not feel pain, I do consider, however, that the many medical procedures which are keeping his body functioning are a burden on him. I find that Archie is suffering physical harm from his condition and the extensive medical treatment he is receiving.

193. He is suffering from regular diarrhoea which has to be treated, he has the procedures and medication that goes with his fluid intake that is so difficult to regulate. The clinicians are struggling with his weight loss and his fluid intake and output and that puts him at risk of sudden and catastrophic cardiac arrest.

194. If Archie remains on mechanical ventilation, the likely outcome for him is sudden death and the prospects of recovery are nil. He has no pleasure in life and his brain damage is irrecoverable. His position is not going to improve. The downside of such a hurried death is the inability of his loving and beloved family to say goodbye.

195. In all the circumstances, on balance, I find that the burdens of the treatment and his condition along with the total lack of a prospect of recovery outweigh Archie's Christian beliefs and the benefits to him of a continuing life on mechanical ventilation for a few more weeks or months with all the other procedures that that entails.

196. On balance, had I not made the declaration set out at paragraphs 180 to 182 above I would have found that it was not in Archie's best interests for him to continue medical treatment in the form of mechanical ventilation and the ancillary care which accompanies the ventilation.

197. That is my judgment.